IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR THE PETITIONER.

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PETITIONER'S REPLY BRIEF.

I.

INTRODUCTION.

Running throughout the defendants' brief and underlying all of their arguments is the suggestion that the conduct of the odd-lot dealers in jointly fixing the odd-lot differential was regulated by the New York Stock Exchange and approved by the SEC (*E.g.*, Resp. Br., pp. 13-16, 21, 76-77, 106). That theme is based on a state of the facts that simply does not exist. It is anchored to two entirely false premises:

> (1) that the Exchange in fact regulated the odd-lot differential in the period in suit, through "settled practice"; and
>
> (2) that both the Exchange and the SEC participated in the fixing of the odd-lot differential in 1951, and found it reasonable.

The facts are (1) that the Exchange did not regulate the odd-lot differential in any way whatsoever, either by practice or by rule; and (2) that neither the SEC nor the Exchange investigated or approved the increase in the odd-lot differential in 1951.

Defendants' version of the facts is unsupported by evidence. Plaintiff's version of the facts is fully supported not only by the undisturbed findings of the District Court,[1] but also by the findings of the SEC Special Study of the Securities Markets (1963).[2]

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1. The Court of Appeals did not reverse the District Court's findings as erroneous, but held only that the findings did not properly bear on the issue of allocating the cost of notice.

2. The Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) (hereinafter cited as: Special Study) was introduced as Plaintiff's Exhibit 1 at the preliminary hearing before the District Court.

With respect to the claim of Exchange regulation of the odd-lot differential, the Special Study found:

1. "The Exchange has allowed the odd-lot differential to be established by the odd-lot firms themselves rather than by Exchange rule, apparently on the theory that a price differential as distinguished from a fee or commission is a matter for negotiation between the odd-lot firms and other member firms." (Special Study, pp. 199-200)

In 1941 the Exchange itself wrote to the SEC:

"The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100-share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change." (Special Study, p. 180)

2. "The New York Stock Exchange apparently is the only registered national securities exchange which does not attempt to regulate the amount of the odd-lot differential." (Special Study, p. 181)

3. "A duopoly dominating a large and important public business would seem a classic case for rate regulation, and the Exchange has clear statutory authority to regulate, yet it has failed to exercise its jurisdiction and thereby disavowed responsibility. Nor has the Commission ever formally exercised its authority under sections 11(b) and 19(b) of the Exchange Act

with respect to the differential or other aspects of odd-lot dealer activities." (Special Study, p. 200)

4. The Exchange did not approve the 1951 increase. "The New York Stock Exchange was informally advised of the proposal and Exchange officials reportedly expressed the view that the Exchange had no jurisdiction and [therefore] would not oppose the increase." (Special Study, p. 181). "A 1961 memorandum from the Exchange's Floor Department to the Board of Governors noted that, 'The records do not indicate that the increase was ever considered by the Advisory Committee or the Board of Governors of the Exchange.'" (Special Study, p. 181, n. 404).

The defendants' claim that the SEC approved the 1951 differential increase "after a two-day hearing" (Resp. Br., pp. 15, 76) is likewise utterly false. There was no such hearing, and no such approval.

The exhibit which defendants cite to establish the SEC "hearing" (Preliminary Hearing, Def. Ex. J) shows only an informal meeting attended by two members of the Commission *staff*, an assistant to the Commission chairman, and the attorney for the two odd-lot dealers. No evidence was offered or introduced, and no argument was made to the Commission itself. The result of the meeting was not SEC approval of the differential as reasonable (as defendants would lead the Court to believe), but merely a failure to object to the increase, based in large part upon the Commission's expressed doubt that it had jurisdiction to object. Special Study, p. 182.

Not until its letter to the Exchange dated June 16, 1966, did the SEC take any affirmative action to require the Exchange to regulate the odd-lot differential. Then, and only then, did the Exchange for the first time undertake such regulation.

Defendants' entire argument based on antitrust immunity[3] falls with the fiction that the Exchange and the SEC had in fact regulated the odd-lot differential prior to 1966. In the absence of regulation by rule or by genuine and active practice, the immunity issue is governed by this Court's decisions in *United States v. Borden Co.*, 308 U. S. 188 (1939), and *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 225-26 (1940),[4] and not by the cases cited by defendants.[5] In those cases the Exchange had actually exercised its regulatory powers, unlike the complete absence of regulation in *Socony*, in *Borden*, and in this case. In *Borden*, this Court held:

> "We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions'." 308 U. S. at 198.

Moreover, it has been clear since *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), that even where regulation has taken place, self-regulation by the Exchange is exempt from the antitrust laws "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U. S. at 357. In *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied*, 401 U. S. 994 (1971), the Court denied the Exchange immunity, holding that any

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3. Significantly, no defendant pleaded immunity in its answer to the Complaint.

4. *Cf. Schechtman v. Wolfson*, 244 F. 2d 537, 539 (2d Cir. 1957).

5. Resp. Br., pp. 74-75.

"exemption must be based on a showing of true necessity." 433 F. 2d at 269.[6]

In this case it is inconceivable that an odd-lot differential artificially inflated by price-fixing is somehow a "true necessity" to making the Exchange Act work. Indeed, the defendants offer no explanation whatever why an excessive differential is needed to make the Act work. They have simply claimed immunity, *ipsi dixerunt.*

In this case the defendants not only fixed the price at which odd-lots were traded on the New York Exchange, but as the SEC Special Study found, also conspired to set the same differential on the regional exchanges, and coerced the Boston Exchange to increase its differential, despite its initial unwillingness to do so. Special Study, pp. 181-85.[7]

Defendants' statement that they acted "openly and under the scrutiny of the SEC and the Department of Justice" (Resp. Br., p. 21) gives an extraordinarily wrong impression, in light of the conclusions of the SEC Special Study and the strictures in the letter of Assistant General McLaren, upon which defendants rely.[8] The Justice De-

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6. *Thill* effectively overrules *Kaplan v. Lehman Bros.*, 371 F. 2d 409 (7th Cir. 1967), *cert. denied*, 389 U. S. 954 (Chief Justice Warren dissenting) upon which defendants rely.

7. By such conduct the defendant odd-lot dealers involved outsiders on other Exchanges in their price-fixing, thereby relinquishing any antitrust immunity they might otherwise have had. *Cf. Maryland & Virginia Milk Producers Association v. United States*, 362 U. S. 458, 472 (1960); *United Mine Workers v. Pennington*, 381 U. S. 657, 669 (1965).

8. The letter, in fact, states that:

> "Historically, the odd-lot differential rates have been fixed by agreement between Carlisle and DeCoppet, who together have put pressure on regional exchanges and others not to deviate from them" (Def. Exh. D, p. 2).

It also concludes that the defendants' "traditional propensity to resist technological change" was a deliberate policy designed to thwart competition (*Id.* at 3, 4). In summary, Mr. McLaren stated that in the absence of initiation of "affirmative Commission action" to require the automation of odd-lot trading, the Department would have to consider the "exercise of antitrust jurisdiction" (*Id.* 3, 5).

partments' decision in 1969 not to oppose a merger was in no way determinative of the rights of Eisen and the class as to price fixing during the period from 1962 to 1966.[9] It did not even amount to "consent" to the merger (Resp. Br., p. 44), nor did it commit the Department itself not to take action in the future. See 28 CFR, Chap. 1 § 50.6 (1968); *Blue Cross of Va. v. Commonwealth of Va.*, 176 S. E. 2d 439 (Va. Sup. Ct. 1970).

Antitrust immunity, in addition, is irrelevant to private enforcement of the Exchange Act. The record fully supports the District Court's findings and its conclusion that "plaintiff and the class he represents are more than likely to prevail at trial." (A289).

Despite defendants' extended discussion of "the substantive law", the District Court's findings of fact and conclusions of law regarding the defendants' antitrust and Exchange Act violations are not properly before the Court for review. The Court of Appeals did not reverse those findings or conclusions as erroneous, but rather held only that the findings did not bear on allocating the cost of notice. Moreover, the defendants have never raised the correctness of those findings and conclusions as a question presented for review, either in this Court or in the Court of Appeals.

Nevertheless, because defendants have repeatedly raised the issue in their Brief, the foregoing reply is in order.

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9. Indeed, the McLaren letter confirms that the abuses found by the Special Study continued through the remainder of the period in suit:

> "To summarize, our recent investigation of the operations of Carlisle and DeCoppet confirms the continued applicability of the Special Study's basic analysis and criticism of odd-lot dealing methods on the N. Y. S. E." (*Id.* at 5).

II.

NO UNDUE DIFFICULTIES ARE LIKELY TO BE ENCOUNTERED IN MANAGEMENT OF THE CLASS ACTION.

A substantial part of the defendants' brief is devoted to an issue that may never arise—"fluid class recovery" as a method of dealing with any residue of damages incapable of being refunded to individual class members. The District Court's view of "fluid class recovery" was necessarily inchoate and tentative, no more than a reference to a possible form of ultimate relief and wholly inappropriate for review at this early stage of the case.[10] By concentrating their argument on "fluid class recovery", the defendants have contrived to misconstrue and exaggerate the issue of manageability, ignoring the plain language of Rule 23.

An action may be maintained as a class action under Rule 23(b)(3) if the Court finds that common questions predominate, "and that a *class action is superior to other available methods* for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: . . . the difficulties likely to be encountered in the management of a class action." (Emphasis added). That is the only part of Rule 23 which refers to manageability. Manageability is thus not an issue as to the 23(b)(1) or (2) aspect of this case. See, *e.g., Bermudez v. United States Department of Agriculture*, — F. 2d —, 17 FR Serv. 2d 1153 (D. C. Cir.), *cert. denied*, 42 U. S. L. W. 3348 (December 10, 1973).

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10. The District Court held that ". . . the fluid class recovery *might* then be appropriate for distribution of the unclaimed remainder." (A217). See also Rule 23(d): ". . . The orders . . . may be amended as may be desirable from time to time."

Moreover, with respect to the Rule 23(b)(3) aspects of the case, "difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques. This perspective is particularly important . . . where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one." *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 282 (S. D. N. Y. 1971), *mandamus denied sub nomine Pfizer, Inc. v. Lord*, 449 F. 2d 119 (2d Cir. 1971). *Cf. Wolfson v. Solomon*, 54 F. R. D. 584, 592 (S. D. N. Y. 1972) ("In fact, the class action is not only a superior method, it is often the only feasible one"). In this case defendants assert theoretical manageability problems, not in support of an alternative remedy, but to prevent any remedy at all. But even such theoretical "problems" are of far less magnitude than defendants assert.

First, 56 per cent of the class members' odd-lot transactions are preserved on computer tapes, along with the members' names and addresses (A185). In addition, as the District Court found, damages here can be calculated by one formula applicable to every transaction (A211-12 and A201). The Court of Appeals did not disturb this finding. Accordingly more than half the damages sustained may be paid out routinely, simply by applying a formula to the tape records, as in the case of the payment of corporate dividends to millions of shareholders.

Trial on the underlying common issues—the conspiracy to fix excessive odd lot rates and the New York Stock Exchange's failure to regulate such rates—would be no different whether there were a single plaintiff, a class of a thousand, or of millions. The trial between the representative plaintiff and the defendants will dispose not only of the underlying questions of liability but also of the measure

of damages. *Dickinson v. Burnham*, 197 F. 2d 973, 981 (2d Cir.), *cert. denied*, 344 U. S. 875 (1952); *Union Carbide and Carbon Corporation v. Nisley*, 300 F. 2d 561, 589 (10th Cir.), *cert. denied sub nomine Wade v. Union Carbide and Carbon Corporation*, 371 U. S. 801 (1962). See, *Epstein v. Weiss*, 50 F. R. D. 387, 393 (E. D. La. 1970); *Feder v. Harrington*, 52 F. R. D. 178, 183 (S. D. N. Y. 1970); *In Re Antibiotic Antitrust Actions, supra; Partain v. First National Bank of Montgomery*, 59 F. R. D. 56, 59 (M. D. Ala. 1973).

No undue difficulty is likely to be encountered in making distribution to those class members whose identities and transactions are recorded on tape, and whose damages can be individually computed by a common formula.

Distribution of damages which can be computed by a formula common to the class as a whole is routine in class actions. For example, in *Gould v. American-Hawiian Steamship Company*, 362 F. Supp. 771 (D. Del. 1973), a class action tried on behalf of a class consisting of several thousand minority shareholders, the court found that the defendants were liable for proxy violations. The court ordered that: "Judgment shall be entered against said defendants *in favor of the plaintiff class*" in an amount to be paid in accordance with a common formula.[11]

In a similar situation, the Second Circuit affirmed, as modified, an award in favor of a shareholder class in *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973). In both *Gould* and *Gerstle* the awards were made in favor of the class as a whole, leaving for future determina-

11. The formula used in *Gould* was as follows: "$8.25 (the amount of the premium per share determined to have been received by Litton and Monroe) multiplied by the number of shares in the class, and by the 1,050,000 shares owned by Litton and Monroe, and divided by 10,632,000 (the number of shares of McLean common stock issued and outstanding prior to the merger)." *Gould v. American-Hawaiian Steamship Co.*, D. Del., C. A. No. 3707/3722, (Order dated October 23, 1973).

tion what should be done with any part of the recovery which, for one reason or another, cannot be distributed. See also, *Partain v. First National Bank of Montgomery, supra,* 59 F. R. D. at 59.

Both defendants and the Court of Appeals make much of a purported concession of plaintiff's counsel that the case is unmanageable absent the fluid class recovery. There was no such broad concession. Plaintiff's counsel had expressed his concern in the District Court that if each of six million class members *"had to present his own personal claim for damages,* the class, indeed, would not be manageable." (A196). He recognized "that it would be impossible for *each member of the class to expend hours or days combing his ancient files* in order to recover—at best—ten or twenty dollars." (A198). In that light, he proposed that "a reduction in the odd-lot differential in the future would do substantial justice." (A197). Counsel did not concede that the action was unmanageable within the meaning of Rule 23,[12] through use of direct payments based on defendants records. Clearly the "combing of ancient files" would be unnecessary with respect to the more than 2,000,000 class members whose identities and transactions are recorded on tape, and whose damages can be computed by the common formula.[13]

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12. Defendants place so much emphasis on this "concession" as to raise the question whether any substance beyond the "concession" supports their assertions of unmanageability.

13. The Amicus Brief of Southern California Edison Company urging affirmance of the decision of the Court of Appeals, recognizes that in *Eisen* (in alleged contrast to environmental cases of special concern to that Amicus) ". . . damages are mathematically computable, assuming liability." (Amicus Br., p. 6). In *City of Philadelphia v. American Oil Company,* 53 F. R. D. 45, 65 (D. N. J. 1971), cited by the defendants (Resp. Br., p. 42) the Court distinguished *Eisen* on the ground that, "The court in *Eisen* was able to make specific findings with respect to the average odd-lot transaction and average odd-lot differential per transaction. . . . In addition, the court in

The District Court did *not* hold that the class action was unmanageable unless recourse were had to fluid class recovery. The court expressly held that individual recovery would not be ruled out: "Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder." (A217).

The primary concern of the District Court was "whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim." (A211).

The record sustains, and the decision of the District Court does not preclude the direct-payment form of relief, commonly used in class actions and analogous situations, with respect to more than half of the odd-lot transactions during the period in suit.[14] With respect to the remainder, notice will elicit further claims, and the question of what to do with any residue is entirely premature.

The prospects of achieving a substantial recovery on behalf of the individual class members are thus real enough to overcome the concern expressed by the Court of Appeals that individual class members would not benefit from any recovery. The District Court clearly planned that the class members would benefit, though it quite properly did not choose a particular distribution program, prior to trial on liability and damages.

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13. (Cont'd.)
Eisen had at its disposal several detailed and specific documents which would be of value in assisting the court in awarding damages if liability were found." (e.g. the Special Study).

14. Refunds were made to more than 1,000,000 ultimate consumers "with reasonable promptness and without serious controversy or criticism" under the supervision of a special master in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 179 F. 2d 896, 899 (8th Cir. 1950). The administrative costs were taxed against the defendants, and eventually paid in part by the defendants and in part from the residue portion of the fund.

III.

ENTRY OF JUDGMENT FOR THE AGGREGATE DAMAGES OF THE CLASS AS A WHOLE AND DISPOSITION OF ANY UNCLAIMED RESIDUE UNDER THE EQUITY POWERS OF THE COURT WOULD NOT IMPAIR SUBSTANTIVE RIGHTS OF THE DEFENDANTS.

Rule 23 requires that the judgment in any class action run to the entire class.

Rule 23(c)(3) requires that the judgment describe those whom the court finds to be members of the class and hence bound by the judgment. In Rule 23(b)(1) or (2) actions, the judgment is required to "*include and describe* those whom the court finds to be members of the class." In Rule 23(b)(3) actions, the judgment is required to "*include and* specify or *describe* those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the Court finds to be members of the class." (Emphasis added). Where the common questions determined in a (b)(3) action include a uniform measure of damages applicable across the board to every transaction, and the number of transactions is known, an aggregate class judgment is appropriate, as recognized, for example, in *Gould v. American-Hawaiian Steamship Company, supra; Gerstle v. Gamble-Skogmo, supra; Daar v. Yellow Cab Co.*, 67 Cal. 695, 433 P. 2d 732 (1967); and *Metro Homes, Inc. v. City of Warren*, 19 Mich. App. 664 (1969), leave to appeal denied, 383 Mich. 761 *cert. denied*, 398 U. S. 959 (1970).

In such circumstances, the entry of a single class judgment is consistent with this Court's recent analysis of the 1966 revision of Rule 23 in *American Pipe and Construction Co. v. Utah*, — U. S. —, 42 U. S. L. W. 4155

(January 16, 1974). The Court held the Rule, by precluding one-way interventions in what were previously labelled as "spurious" class actions, converted them from mass joinder devices, as which they had sometimes been regarded, into true class actions in which the class members are bound by the judgment whether favorable or adverse.[15]

In the early history of the class action device at equity, the representative plaintiff was regarded as the true surrogate of the members of the class, as Professor Chafee has shown. Judgment was traditionally entered in favor of the representative for the benefit of the class as a whole, and what was done with the fund then became his concern as trustee for the class, under the supervision of the Court, not the concern of the defendants, who had been adjudged liable for the full recovery. Chafee recounts how "representative suits involving money claims were adjudicated in equity as a matter of course from early times . . . Class suits originated in Chancery, . . . and courts were long inclined to keep them there. This was not just historical nostalgia. A jury might well be bewildered by this queer multipartite proceeding. . . . And the old-time machinery of the law courts was not well adapted to handling a class money judgment. . . . If the representatives . . . successfully collected the judgment, how could a law court compel

15. The Court's reasoning in *American Pipe and Construction Co.* disposes of the defendants' argument that the prior decisions in *Snyder v. Harris*, 394 U. S. 332 (1969) and *Zahn v. International Paper Company*, — U. S. —, 42 U. S. L. W. 4087 (December 17, 1973) preclude entry of judgment in favor of the class as a whole. Those decisions rejected attempts to expand federal diversity jurisdiction. They emphasized the continuing importance of the class action where federal statutes confer jurisdiction without regard to the amount in controversy. As noted in *Zahn*: "Of course, Congress has exempted major areas of federal question jurisdiction from any jurisdictional amount requirements, . . . the exemption being so widely applicable, in fact, that the Court in *Snyder v. Harris*, 394 U. S., at 341, discounted the impact of its holding in federal [question] cases." *Zahn v. International Paper Company*, *supra*, n. 11.

them to distribute the money among the members of the class? No doubt, they held the money under some sort of trust, but the job of compelling every trustee to do his duty belongs to equity." Chafee, SOME PROBLEMS OF EQUITY (1950), Ch. VII, pp. 285-86.

In other words, distribution of the fund is the concern of the court, not of the defendants. *Cf. Hodgson v. Wheaton Glass Co.*, 446 F. 2d 527, 535 (3d Cir. 1971).

This Court employed the same analysis in *Dickinson v. Petroleum Conversion Corporation*, 338 U. S. 507 (1950) holding:

> "The court's reservation of jurisdiction to supervise the distribution of the shares of stock and the provision for further proceedings to determine the individual shares in the aggregate recovery allowed did not in any manner affect [defendant] Petroleum's rights. What the court reserved was essentially supervisory jurisdiction over the distribution among the class of the recovery awarded the intervenors as the class' representatives." 338 U. S. at 515.

Quite apart from the judgment favoring the entire class, the court's general equity powers also extend to requiring the defendants to pay over the aggregate amount of the overcharge. Such equity powers may be exercised without express provision as an adjunct of a statutory scheme. *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946), a decision which the defendants mention in passing, but make no real effort to distinguish (Resp. Br., p. 45). See also, *University of Southern California v. Cost of Living Council*, 472 F. 2d 1065, 1070 (Temp. Emerg. Ct. App. 1972).

Entry of judgment for the aggregate damages of the class as a whole does not deprive the defendants of any

substantive rights. As the Amicus Brief of the States of Alabama, Alaska, et al., points out, entry of judgment in favor of a class as a whole is not precluded by any substantive language of § 4 of the Clayton Act. ". . . [A] 'person . . . injured in his business or property' is no less a person because his name is unknown, and the damages are no less 'actual' because they have been proved by a representative rather than a collection of individuals." (Alabama Br., p. 23).[16] The disposition of any residue by means of fluid recovery would "not modify substantive rights," and is supported by sound precedent. *Note, Managing The Large Class Action: Eisen v. Carlisle and Jacquelin,* 87 Harv. L. Rev. 426, 446-451 (1973).

Disposition of an unclaimed residue falls within the equity powers of the court. *Federal Power Commission v. Interstate Natural Gas Company,* 336 U. S. 577 (1949); *Market Street Railway Co. v. Railway Commission,* 171 P. 2d 875 (1966); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, supra.* Reduction of the odd-lot charge provides one equitable solution. Recourse to the *cy pres* doctrine would provide another. That was the solution approved by the Second Circuit in *State of West Virginia v. Chas. Pfizer & Co., Inc.,* 440 F. 2d 1079 (2d Cir.), *cert. denied sub nomine, Cotler Drugs, Inc. v. Chas. Pfizer & Co.,* 404 U. S. 871 (1971), where the unclaimed residue was used by

16. The framers of the Rule rejected a requirement that class members "opt-in" to a class action, adopting instead the view that the anonymity of class members who do not opt-out does not affect the viability of their claims. Kaplan, *Continuing Works of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure,* 81 Harv. L. Rev. 356, 398. "In the circumstances, delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class. Otherwise, the (b)(3) type would become a class action which was not that at all—a prime point of discontent with the spurious action from which the Advisory Committee started its review of Rule 23." See also Rule 23(c)(2)(B) (Pet. Br., p. 4).

the states for public purposes.[17] See also, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972).[18]

Defendants' argument that the "fluid class recovery" is contrary to the requirements for recovery under Section 6 of the Exchange Act is without merit. They do not dispute the holding of cases such as *J. I. Case v. Borak*, 377 U. S. 426 (1964), and *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971) that "federal courts may use any available remedy to make good the wrong done". *Cf. SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90-94 (S. D. N. Y. 1970), *aff'd in part, rev'd in part*, 446 F. 2d 1301 (2d Cir.), *cert. denied*, 404 U. S. 1004 (1971). Defendants cite *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.), *cert. denied*, 323 U. S. 737 (1944), as limiting recovery under Section 6 of the Exchange Act to those injured. *Baird v. Franklin* held on the facts that the breach of duty committed by the Exchange was not the proximate cause of injury to the plaintiffs, but indicated that an action would otherwise lie.

Furthermore, *Eisen* involves a claim for equitable relief. The *Eisen* complaint requests specific equitable relief, including judgment "[d]irecting defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the

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17. The defendants do not so much as mention the Second Circuit's decision in *Pfizer*. They argue that the District Court's decision is inapplicable since it arose in a settlement context. The power of the District Court to deal with the residue was at issue on the appeal (albeit between different plaintiff classes). The rights of non-claiming class members, purportedly asserted by defendants, are no different whether the fund has resulted from settlement or litigation.

18. Escheat is another possibility. *See*, 28 U. S. C. § 2042; *United States v. Klein*, 106 F. 2d 213 (3d Cir.), *cert. denied*, 308 U. S. 618 (1939); *Hodgson v. Wheaton, Glass Co., supra*, 446 F. 2d at 535.

amount by which the differential has been excessive in the past."[19] It also requests ". . . such other and further relief as may be just." (A26). Under Section 27 of the Exchange Act, 15 U. S. C. § 78aa, the District Court has equity jurisdiction to award damages or such other retrospective relief as the merits of the controversy may require. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), *Crane Co. v. American Standard, Inc.*, — F. 2d —, CCH Fed. Sec. L. Rep. ¶ 94,327, pp. 95,122-23 (2d Cir., December 19, 1973).

Defendants' argument that use of the fluid class device would intrude upon the exclusive jurisdiction of the SEC is likewise unsound (Resp. Br., pp. 48-52). There is no exclusive jurisdiction conferring immunity against the violations of the antitrust laws and the securities laws herein. *Silver v. New York Stock Exchange, supra. Cf. J. I. Case v. Borak, supra.* See also, pp. 4-5, *supra.* As the Court of Appeals noted in *Eisen II*, no adequate administrative remedy exists for Eisen and the plaintiff class (A127), so that the model of initial agency action with subsequent judicial review is inapposite.[20]

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19. This request for relief has not been rendered moot by subsequent reductions in the odd-lot differential, or merger of the odd-lot dealer defendants, as defendants contend (Resp. Br., p. 44). There is no showing that such changes have eliminated all taint of the defendants' violations.

20. While the Exchange has twice changed the odd lot differential, since the period for which damages are sought, neither regulation was promulgated by an SEC order, under Section 19 of the Exchange Act, 15 U. S. C. § 78s (Resp. Br., pp. 48-49). Defendants are clearly wrong, therefore, in suggesting that such an order is involved, subject to review only by a Court of Appeals under Section 25(a) of the Act, 15 U. S. C. § 78y (Resp. Br., p. 49). Changes effected by the Exchange itself are subject to review in the district courts. *Independent Broker-Dealers' Trade Association v. SEC*, 442 F. 2d 132 (D. C. Cir.), *cert. denied*, 404 U. S. 828 (1971). *Cf. PBW Stock Exchange v. SEC*, 485 F. 2d 718 (3d Cir. 1973). Furthermore, the plaintiff and the members of the plaintiff class are outside the ambit of Section 25(a), which circumvents district court

Fluid recovery entails paying current odd lot traders an aggregate amount equal to any damage residue, by means of a set-off against current commissions. It is simply a way of liquidating a judgment, and encroaches upon the jurisdiction of the SEC no more than any money judgment for customers encroaches upon the jurisdiction of the regulating agency. *See, Federal Power Commission v. Interstate Natural Gas Company, supra,* 336 U. S. at 582-83.

Any interest of the SEC can be accommodated by inviting its participation in the proceedings, a procedure adopted by the district court pursuant to the suggestion of the court of appeals in *Thill Securities Corp. v. New York Stock Exchange, supra,* 433 F. 2d at 273.[21]

IV.

THE RIGHT TO JURY TRIAL DOES NOT POSE DIFFICULTIES OF MANAGEMENT.

The Amicus Brief of the American College of Trial Lawyers ("ACTL Br.") raises the spectre of 100,000 individual jury trials, assuming that only 100,000 claimants come forward, so that "the claims could not be determined in a manner consistent with the Constitution in much less than 100 years." (ACTL Br., p. 5). In a case like *Eisen,* where damages can be calculated on a formula basis, that kind of *in terrorem* argument makes nonsense of class

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20. (Cont'd.)
review for *parties* to SEC proceedings. Since the odd lot differential was not the subject of Commission proceedings, the plaintiff and class members can not even be argued to have been parties thereto.

21. Objections to the fluid recovery theory, including that based upon SEC jurisdiction, are entirely premature, since there is no assurance at this time that the District Court will adopt that technique, rather than another, for the equitable disposition of any residue of the class judgment.

actions, which these *Amici* seek to reconvert into mass joinders. The argument ignores the fundamental principle that: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical." *Hansberry v. Lee,* 311 U. S. 32, 41 (1940). There is to be one decree, not a multitude. Rule 23(c)(3). Only one trial—between the class representative and the defendants—is necessary to determine the common issue of total damage to the members of the class. *Dickinson v. Burnham, supra,* 197 F. 2d at 980-81 (2d Cir. 1952); *Union Carbide and Carbon Corporation v. Nisley, supra,* 300 F. 2d at 589. *See also, Feder v. Harrington, supra,* 52 F. R. D. at 183; *Partain v. First National Bank of Montgomery, supra,* 59 F. R. D. at 59; and *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at 289 ("In these circumstances the Court cannot conclude that defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages."). See, *Dickinson v. Petroleum Conversion Corporation, supra,* 338 U. S. at 515 (quoted at p. 14, *supra*). Defendants will have a full and fair opportunity to litigate all damage issues in the one trial.

Rule 23(d) as promulgated by the Court, provides that, "In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or *prescribing measures to prevent undue repetition* or complication *in the presentation of evidence or argument;* . . ." (Pet. Br., p. 4, emphasis added). The Advisory Committee Note to Rule 23 recommends that, "The court should consider . . . what measure should be taken to simplify the proof and argument." 39 F. R. D. at 106 (Resp. Br., p. 26 sa).

". . . [T]he proof of damages which the district court foresaw would have been based upon the defendants' records plus various studies of the odd lot industry. These should be every bit as reliable in establishing damages as the records and affidavits of individual odd lot customers. Furthermore, as the district court pointed out, an exact computation of damages is unnecessary under the Clayton Act. The Supreme Court has articulated the standard as follows: 'The jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data.' [*Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946); see *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-124 (1969)]."[22] If the defendants are held liable for all of the damages they have caused, that is scarcely an infringement of their substantive rights.

Defendants' jury trial argument also fails to consider the equitable origin of class actions described by Professor Chafee, who suggests that the court should consider class suits for damages "equitable by nature on the analogy of bills for an accounting, where the issues are so complex that a jury trial furnishes an inadequate remedy." (Chafee, *op. cit., supra,* at p. 286). The equitable accounting advocated by Chafee is especially appropriate in dealing with the 56 percent of the transactions of the class which are recorded on computer tapes in the defendants' possession.[23]

In many price fixing and securities actions global damages can: ". . . be accurately computed by reliance on sales figures. . . . Most important management decisions in the business world in which these defendants operate are made

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22. Note, *supra,* 87 HARV. L. REV. at 449.

23. The American College of Trial Lawyers' assertion that ". . . the requisite proof is not available in the books and records of the respondents", (ACTL Br., p. 4) overlooks these tapes.

through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action. The court is confident that they can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability." *In Re Antibiotic Antitrust Actions, supra,* 333 F. Supp. at 289.

V.

THE NOTICE PRESCRIBED BY THE DISTRICT COURT MEETS THE STANDARDS OF DUE PROCESS AND RULE 23.

The defendants submit that the Court of Appeals correctly held that individual notice is not necessarily required by due process in Rule 23(b)(1) and (2) actions (Resp. Br., p. 59 n. 19). They declare: "The Court of Appeals' decisions (Eisen II and Eisen III) leave ample room for effective civil rights and environmental suits. Such suits are traditionally brought for injunctive relief and, under the decisions below, would not be subject to the notice requirements specified in Eisen; . . ." (Resp. Br., p. 100).[24]

That necessarily confirms the plaintiff's position that individual notice is not a requirement of due process.

Indeed, the defendants submit that: "What is important is that the judgment naturally benefits all persons similarly situated." (Resp. Br., p. 100). The notice prescribed by the District Court in this case is, therefore, by the defendants' own admission, more than sufficient to

24. Of course, many civil rights class actions, such as those concerning employment discrimination, and some environmental class actions, such as the oil spill cases, are brought for damages as well.

sustain the action for equitable relief.[25] It is just as clear that a damage judgment herein, if the class action is sustained and Eisen wins his case, will "naturally benefit" the more than 2,000,000 identifiable class members who can be reimbursed by formula from the defendants' transaction records, and will benefit additional individual class members to the extent that they respond to notice.

Analysis of the interests of the class intended to be protected by notice, as described by the defendants themselves, supports the program of notice prescribed by the District Court. Those interests include the "individual's right to withdraw from the case, bring his own claim, or seek to play a role in management of the action . . ." (Resp. Br., p. 55).

The opportunity to participate is no less significant and, indeed, frequently more so in Rule 23(b)(1) and (2) actions, where defendants concede that individual notice is not required (Resp. Br., p. 59 n. 19 and p. 100). In *Eisen*, where the individual stake is very small, that factor has correspondingly little significance, as does the possibility of individual suit. Indeed, the defendants themselves assert that there is no risk of inconsistent results, because it would be too expensive for individuals to pursue their claims separately (Resp. Br., p. 60). The Court of Appeals was satisfied in 1968 that: ". . . the present case appears to fall within that class of cases in which 'the interests of individuals in conducting separate lawsuits' are more 'theoretic than practical' . . ." (A126).

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25. This should, in turn, sustain the notice in its (b)(3) aspect. "It will be found that cases satisfying (b)(1) or (b)(2) will also pass muster under (b)(3). As was perceived in *Van Gemmert v. Boeing*, 259 F. Supp. 125 (S. D. N. Y. 1966), the cases should then ordinarily be treated under the former provisions rather than the latter." Kaplan, *op. cit. supra*, 81 HARV. L. REV. at 390 n. 130.

What remains? Defendants suggest that class members are entitled to individual notice because some "may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious" (Resp. Br., p. 59). It has been held that members of a class (other than the plaintiff and any intervenors), who do not request exclusion ". . . are not parties and would not be liable for costs . . ." *Lamb v. United Security Life Company*, 59 F. R. D. 44, 48 (S. D. Iowa, 1973).[26] And that, "If class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule 23." *Id.* For the same reason interrogatories to the individual class members have been held inappropriate. *Fischer v. Wolfinbarger*, 55 F. R. D. 129 (W. D. Ky., 1971); *Wainwright v. Kraftco Corp.*, 54 F. R. D. 532 (N. D. Ga., 1972); *Gardner v. Awards Marketing Corp.*, 55 F. R. D. 460 (D. Utah, 1972). In the circumstances of this case the real concerns of due process and Rule 23(c)(2) are well served by the initial notice prescribed by the District Court.

As the Court of Appeals reads the language of Rule 23(c)(2),[27] the phrase "practicable under the circumstances" does not extend to "individual notice". The result "is unnecessarily harsh. Given the rule's requirement that only a 'reasonable effort' need be made to identify class members it is pointless to require a disproportionate effort to notify those who are thus identified. A better reading would make the efforts required by these phrases comparable. Furthermore, the evidence that the rule was designed to satisfy due process without imposing an addi-

26. *Cf.*, Chafee, Some Problems of Equity, Ch. VI, p. 219.

27. "[I]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . ."

tional requirement suggests that practicability must always be a consideration in evaluating notice, since it is central to the due process test." Note, *supra*, 87 HARV. L. REV. at 440.[28]

Professor Kaplan, as reporter to the Advisory Committee, was also firmly of the view that practicability was intended as the test for individual, as well as other, (c)(2) notice. Kaplan, *op. cit.*, 81 HARV. L. REV., *supra*, at 396.

VI.

REQUIRING DEFENDANTS TO SHARE THE COST OF NOTICE DOES NOT VIOLATE THEIR FIFTH OR SEVENTH AMENDMENT RIGHTS.

The Court of Appeals recognized that in some cases defendants can properly be required to advance the cost of notice, distinguishing *Eisen* because it was not a derivative suit in which defendants owed a special duty to plaintiffs, or a suit against a public utility by its customers in which the utility customarily sent monthly bills to plaintiffs (A352 n. 5).

The defendants support the holding that in some class actions it may be appropriate to require the defendants to pay for notice, arguing that: "Many of the briefs amici overlook this careful limitation in the Court of Appeals decision." (Resp. Br., p. 63). The New York Stock Exchange and its members, the odd-lot dealers, owe no lesser

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28. *Accord*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 605 (1974); ". . . [I]f the representation of an absent class member's interests is found to have been adequate, the absentee, in effect, will have had his day in court and notice should not be required as an additional due process requirement. Support for this approach may be found in the *Restatement of Judgments* [§ 86, comments (b) and (h) (1942)], in *Hansberry* [*v. Lee*, 311 U. S. 32 (1940)], and in other decisions which have asserted . . . that adequacy of representation rather than notice is the essential prerequisite of due process."

duty to the investing public than a public utility owes to its customers. There is certainly no distinction rising to constitutional significance between *Eisen* and cases in which defendants concede that the cost of notice may properly be allocated to defendants. In *Eisen* the plaintiff remains liable for costs, should the defendants ultimately prevail and, in that event, defendants would have a judgment for costs against him.[29]

The cost of notice in a class action should properly be regarded as an ordinary expense of litigation, and within the power of the District Court to allocate. The defendants attempt to distinguish the cases relating to the cost of discovery (Pet. Br., n. 8 and p. 41) on the ground that: "Those costs are traditional and consistent with the adversarial process of litigation—totally different from being required to finance a lawsuit against one's self." (Resp. Br., p. 68).

Defendants are not being required to finance a lawsuit against themselves (Resp. Br., p. 68).[30] The phrase implies, incorrectly, that they are being compelled to pay a cost required of the individual plaintiff and benefitting only the plaintiff and the members of the class.

Rule 23(c)(2) requires that the "court shall direct" notice to the class; it does not state against whom the cost should be taxed. Division of the cost of notice has become as traditional as discovery costs in the district courts, since the 1966 amendment to Rule 23 (Pet. Br., pp. 38-39), and here an adversary hearing has determined that plaintiff and the class are likely to prevail on the merits.

Defendants benefit, as do the members of the plaintiff class, where, as here, notice in conformity with Rule 23 and

29. The plaintiff did not claim that he could not pay any more than token costs (Resp. Br., p. 66), but rather that whatever he had to put up would be an undue burden on him (A273).

30. The argument against "financing a lawsuit against one's self" could be made more appropriately with regard to costs of discovery, which may benefit only the adverse party.

the requirements of due process has been ordered by the District Court.[31] If the defendants prevail on the merits, the entire class is bound by the adverse judgment. *Cf. American Pipe & Construction v. Utah, supra.* The benefit to defendants is not theoretical. They complain at some length about the alleged inadequacy of the scope of notice ordered by the district court, on the ground that defects in notice may deprive them of the *res judicata* effect of the judgment (Resp. Br., p. 61).

Because all parties benefit from notice, and because the cost of notice is a cost of litigation required by Rule 23, it is no denial of due process to require the necessary cost to be advanced by the party shown most likely to be ultimately liable for it.[32]

The hearing on allocation of the cost of notice did not infringe defendants' right to a jury trial. Costs "are never within the province of the jury." *Harkless v. Sweeny Independent School District,* 278 F. Supp. 632, 637 (S. D. Tex. 1968), *rev'd on other grounds,* 427 F. 2d 319 (5th Cir. 1970), *cert. denied,* 400 U. S. 991 (1971). In any event, the defendants did not request a jury trial on this issue in the District Court.

VII.

THE DISTRICT COURT'S ORDERS SUSTAINING THE CLASS ACTION WERE NOT APPEALABLE.

A. There Was No Appealability as of Right.

Defendants lump together as a single "final" decision "appealable of right under 28 U. S. C. § 1291" two sepa-

31. See the Brief of Amicus the Commonwealth of Pennsylvania, pp. 5-7.

32. Defendants do not contest the requirement that they ultimately pay for notice, if the plaintiff prevails at trial. At issue is their contention that the cost may not be assigned to them in the interim, though the District Court has found a great likelihood that ultimately they will be found liable (A289-90).

rate orders of the District Court, entered one year apart (Resp. Br., p. 82). The 1971 order (A199) sustained the plaintiff's right to maintain the action as a class action. It is separate and distinct from the 1972 order requiring the defendants to advance part of the cost of notice (A275). Respondents' appealability arguments based upon the cost of notice (Resp. Br., pp. 84-85) are not pertinent to the 1971 order of the District Court sustaining the class action. That order is subject to modification in the District Court and is not appealable under the overwhelming weight of authority, as cited in Petitioner's Brief at pp. 21-22. *Accord, Thill Securities Corp. v. New York Stock Exchange,* 469 F. 2d 14, 17 (7th Cir. 1972).

The April 4, 1972 order, which imposed 90 percent of the cost of notice on the defendants was not a final order under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The Court of Appeals itself recognized that in some cases imposition of the cost of notice on defendants is proper (A352 n. 5). Defendants agree, arguing that the Court of Appeals limited its holding to "this type of case" (Resp. Br., pp. 19, 63). As a general principle, therefore, the right of the district court in class actions initially to allocate the cost of notice to defendants in appropriate circumstances is uncontested; it is only the particular application in this case that the defendants challenge. *Cohen* does not hold such an issue appealable. With regard to such issues, this Court said: "If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." 337 U. S. at 547. The decision of the Court of Appeals in *Eisen* fosters the kind of case by

case piecemeal review which is generally forbidden, and to which the *Cohen* exception does not apply.[33]

Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A., 339 U. S. 684 (1950), relied on by defendants, held that an order dissolving the attachment of a ship was immediately appealable, but contrasted an order allowing an attachment to stand, which is not. The latter is the correct analogy, for the plaintiff will be liable for the costs, should defendants prevail at trial.

Interlocutory orders requiring far greater expenditure than that involved here have repeatedly been held inappropriate for review in view of the policy of finality. See Petitioner's Brief at pp. 24-25, fn. 8. *Cf. IBM Corp. v. United States,* 1973-2 CCH Trade Cases ¶ 74,833 (2d Cir. 1973), in which the Second Circuit held that an order of the District Court imposing a fine of $150,000 a day for civil contempt in refusing to comply with a discovery order, was interlocutory and not appealable.

In *Republic Natural Gas Company v. State of Oklahoma,* 334 U. S. 62, 70-71 (1948), the Court held that, "... [T]he incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention. ... Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review. ... The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction."

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33. The defendants cite the decision in *Pfizer, Inc. v. Lord,* 449 F. 2d 119 (2d Cir. 1971) to demonstrate the "sizeable judicial resources" consumed in that case (Resp. Br., p. 98). The appellate court's observation, in its context, is in point:

> "This litigation has already consumed sizeable judicial resources and can be expected to do so. It is not particularly helpful to have the defendants seek interlocutory review of each decision of the district court with which they disagree."

B. The Court of Appeals Had No Retained Jurisdiction.

Defendants adhere to the position that the District Court's 1966 order initially denying class status (A93) was interlocutory and not appealable (Resp. Br., p. 92). If they are correct, the Court of Appeals had no jurisdiction to "retain". In any event, the correctness of the initial "death knell" appeal need not be reached. An appellate court cannot reverse the District Court and by contradiction purport to retain plenary jurisdiction years later. See Petitioner's Br., pp. 20-21.

The cases cited by the defendants are inapplicable, because in each of those cases the appellate court explicitly withheld judgment while remanding only for further findings. *Cf. United States v. Johnson,* 73 U. S. [6 Wall.] 792 (1868). Here the Court of Appeals explicitly rendered judgment of reversal (A133 and A138).

VIII.

THE DISTRICT COURT'S ORDERS DID NOT VIOLATE THE ENABLING ACT OR PRINCIPLES OF FAIRNESS.

The defendants suggest that the class action orders of the District Court would so alter their substantive rights as to violate the terms of the Rules Enabling Act, 28 U. S. C. § 2072 (Resp. Br., pp. 24-25). This Court has held, to the contrary, that a procedural rule that subjects defendants to the jurisdiction of the courts is not thereby other than procedural. In *Mississippi Publishing Corporation v. Murphree,* 326 U. S. 438, 445-446 (1946), the Court observed that:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not ad-

dressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U. S. 1, 11-14. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the District Court for Northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced."

In *Sibbach v. Wilson & Co.*, 312 U. S. 1, 14 (1941) the Court held that: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Accord: Hanna v. Plumer*, 380 U. S. 460 (1965). See also, pp. 14-15 *supra*.

In addition, the defendants rely upon an alleged *in terrorem* effect of Rule 23(b)(3), which they claim amounts to "blackmail" (Resp. Br., pp. 102-104). It is true that the prospect of liability may induce settlement, be it liability in an individual action or in a class action.[34]

34. But there is no reason to suppose that such pressures are unfair. If defendants have overcharged vast numbers of people of an enormous aggregate sum, it is entirely appropriate that a suit to recoup that sum *in toto* should create great pressure. As Professor Dole has pointed out class suits based on meritorious claims are quite different from "strike suits" based on frivolous claims. Rule 23(e) provides safeguards against the latter. See Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974 (1971). *Cf. Papilsky v. Berndt*, 466 F. 2d 251, 254 (2d Cir. 1972). It is the result urged by the defendants that is inappropriate, namely that guilty defendants should be allowed to keep their illegally gotten gains.

In *Telex Corporation v. International Business Machines Corp.*, 1973 CCH Trade Cases ¶ 74,774 (N. D. Okla., 1973), the district court entered judgment in favor of the sole plaintiff for $259.5 million. The actual liability in that action between individuals was more than twice the maximum estimated liability in the action at bar, which is conceded by all to be a large class action. Any *in terrorem* effect was presumably far greater there than here.

Defendants' claim simply is not true, that in consequence of the *in terrorem* effect or otherwise, all class actions are settled (Resp. Br., p. 105).[35] Many class actions have proceeded to trial. *E.g., Gould v. American-Hawaiian Steamship Company, supra; Gerstle v. Gamble-Skogmo, supra; Escott v. BarChris,* 283 F. Supp. 643 (S. D. N. Y. 1968); *Feit v. Leasco Data Processing,* 332 F. Supp. 544 (E. D. N. Y. 1971); *Kohn v. American Metal Climax,* 322 F. Supp. 1331 (E. D. Pa., 1971), *aff'd in part rev'd in part* 458 F. 2d 255 (3d Cir. 1972), *cert. denied* 409 U. S. 874 (1973); *Robinson v. Lorillard Corporation,* 319 F. Supp. 835 (M. D. N. C. 1970), *aff'd in part rev'd in part* 444 F. 2d 791 (4th Cir.), *cert. denied* 404 U. S. 1006 (1971); *Siegel v. Chicken Delight,* 311 F. Supp. 847 (N. D. Cal. 1970), *aff'd*

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35. The defendants do not disclose the role of William Simon, whom they cite to this Court as a "commentator" on class actions supporting their *in terrorem* theory (Resp. Br., p. 103). They quote his "comments" on the very case in which he was counsel of record to defendant Humble Oil & Refining Co., without disclosing his interest. *(City of Philadelphia v. American Oil Co., supra.)*

His client, Humble, did not move for summary judgment in the *City of Philadelphia* proceedings. It had in fact, by the time of settlement, pleaded *nolo contendere* to a related federal price-fixing indictment. Nor were the private actions settled as a direct result of certification of the governmental and bulk purchaser classes. They were settled one-and-a-half years later, after the plaintiffs secured and upheld against appeal by, *inter alia,* Humble Oil & Refining, an order permitting inspection of grand jury transcripts. *United States v. American Oil Company,* 456 F. 2d 1043 (3d Cir.), *cert. denied sub nomine American Oil Company v. City of Philadelphia,* 409 U. S. 893 (1972).

in part rev'd in part 448 F. 2d 43 (9th Cir. 1971), *cert. denied* 405 U. S. 955 (1972); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E. D. Mich. 1973). There is no indication that the settling proportion of class actions exceeds the settling proportion of other actions.

Finally, Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment. It affords every bit as much protection against alleged "blackmail" in class actions as it does in other actions.

IX.

THE INTERESTS OF JUSTICE REQUIRE REVERSAL OF THE DECISION OF THE COURT OF APPEALS.

The defendants suggest that Rule 23(b) was intended solely as a procedural device to achieve economies of time and effort, as a "device for consolidating numerous *existing* claims." (Resp. Br., pp. 97 and 26-27). That was only half of the dual purpose of the revised Rule.

Although the defendants' attempt to characterize the pre-1966 cases as pertaining only to the avoidance of multiple suits, the decisions were clearly otherwise. This Court's decision in *Smith v. Swormstedt*, 57 U. S. 288, 302 (1853), expressed concern lest in the absence of class suits no effective adjudication could be had, and held that, "For convenience, therefore, *and to prevent a failure of justice*, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." (emphasis added).

The Seventh Circuit observed in *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 88, 90 (7th Cir. 1941), long before the 1966 revision, that:

> "To permit the defendants to contest liability with each claimant in a single separate suit, would, in many

cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent."

The Advisory Committee Notes do not indicate that consolidation of existing claims was the sole purpose of Rule 23(b)(3), as defendants contend (Resp. Br., pp. 26 and 97). To the contrary, the Note to Rule 23(b)(3) specifically envisions class certification, where as here the "amounts at stake for individuals may be so small that separate suits would be impracticable." 39 F. R. D. at 104 (Resp. Br., p. 21sa).

To bolster their position, defendants cite a remark by Professor Kaplan, Reporter to the Advisory Committee during the 1966 revision, that economy is a goal of Rule 23. One goal does not preclude another, and Professor Kaplan has observed that:

> "The entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, *A Prefatory Note*, 10 B. C. IND. & COMM. L. REV. 497 (1969).[36]

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36. See also, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules, supra*, 81 HARV. L. REV. at 398 (for "small claims held by small people" the (b)(3) action intentionally "serves something like the function of an administrative proceeding". . . . The alternative of treating such claims and persons "as null quantities is questionable").

The many disinterested and learned commentaries upon Rule 23 cited in Petitioner's Brief and this Reply Brief have generally applauded the operation of Rule 23 in efficiently securing relief from violations of law affecting numerous individuals; for example, the articles by Professors Hazard, Homburger, Kaplan, and Miller. District Judge Jack Weinstein, formerly a distinguished professor of civil procedure at Columbia University, likewise views class actions as generally manageable and not abusive. Weinstein, "Some Reflections on the 'Abusiveness' of Class Actions" 58 F. R. D. 299 (1973).[37] Judge Weinstein sounds the warning that class actions touch "on the credibility of our judicial system":

> "Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against a corporation, which has benefitted to the extent of many millions of dollars from collusive, illegal pricing of its goods." 58 F. R. D. at 305.

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37. Judge Weinstein is unimpressed by complaints about "what one appellate judge in our circuit has dubbed the elusive Frankenstein Monster posing as a class action," responding, "I suggest that the monster is neither so large or as terrible as some would have us believe. The procedure is merely one means for transforming legal rights into effective remedies," *Id.* The observation is especially compelling, coming as it does from a District Judge who has both disallowed and sustained class actions, and seen them through trial. *E.g., Dolgow v. Anderson,* 43 F. R. D. 472 (E. D. N. Y. 1968) and *Feit v. Leasco,* 332 F. Supp. 544 (E. D. N. Y. 1971).

Judicial efficiency is not achieved by closing the doors of justice; it is achieved by efficient procedure in the pursuit of justice.

Finally, a statement of the Securities Exchange Commission as cited at some length in *Dolgow v. Anderson*, 43 F. R. D. 472, 482-484 (E. D. N. Y. 1968) declares that:

> "The Activities of The Securities and Exchange Commission Do Not Eliminate The Need For Class Action Procedure In Private Actions Based on Violations of the Federal Securities Laws. . . .
>
> "Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fraudulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action seems to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such remedies may be vindicated."

Plaintiff has refrained throughout from citing partisan "authorities". That principle has, unfortunately, not been followed by the defendants who cite Professor Handler, William Simon, and the work of the Committee on Rule 23 and Multidistrict Litigation of the American College of Trial Lawyers.[38] The interests of these concededly eminent members of the bar are not disclosed in either the defendants' brief or the ACTL Amicus Brief. They, and the firms in which they are the senior litigators, have in fact been involved in a number of cases cited disparagingly, and inaccurately, in the ACTL Amicus Brief (p. 21).[39] Mr. Gates

38. Whose members are also the authors of the ACTL Amicus Brief (ACTL Br., p. 22).

39. The description of the *American Oil Company* litigation includes only the recoveries of certain sub-classes. It omits to mention

was counsel for defendant Phelps Dodge in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452 (E. D. Pa. 1968), the brass mill price fixing class action litigation. Mr. McAfee represented defendant Rheem in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E. D. Pa. 1972), *rev'd* 487 F. 2d 161 (3d Cir. 1973), the plumbing fixtures price fixing litigation. His firm Cravath, Swaine & Moore represented defendant California Oil Company in *City of Philadelphia v. American Oil Company*, 53 F. R. D. 45 (D. N. J. 1971), the tri-state gasoline price fixing litigation. Mr. Strubing's firm, Pepper, Hamilton & Scheetz, represented defendant Sun Oil Co. in the *American Oil Company* case and Crane Co., as a defendant in the plumbing fixtures litigation. Mr. Schwartz' firm, Sullivan & Cromwell, represented American Standard in the plumbing fixtures litigation. Mr. Simon represented Humble Oil and Refining Co. in the *American Oil Company* case,[40] and Professor Handler represented defendant Texaco therein. They have also represented defendants in many class action cases not cited in the ACTL Brief.[41]

To state that distinguished counsel are not disinterested is not to belittle them. But the presence or absence of personal interest is necessarily a factor in evaluation, and properly should have been disclosed. *Cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. 127, 140 (1961).

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39. (Cont'd.)
the recoveries by 2,946 entities, in the general governmental sub-class, who shared between them a net refund of more than $18 million.

40. See Note 35, *supra*.

41. For example, Mr. Schwartz represents defendant American Metal Climax, Inc. in a securities class action tried to a successful conclusion by counsel for the petitioner herein as to liability and equitable relief on behalf of the class. *Kohn v. American Metal Climax, Inc.*, *supra*. Following appeal, the case was settled for $6,500,000 in cash, and other benefits.

It may be that the position advocated by these attorneys reflects the interests of their regular clients, on whose behalf they have opposed class actions in the above cases, among others.[42] At least one author of the ACTL Amicus Brief has in fact expressed views at odds with that Brief, when he has stepped outside of his role as advocate. On that occasion, Mr. Strubing, addressing the Pennsylvania Bar Institute as a faculty member of a recent panel on class actions, stated that:

> "As to notice, I predict that the method of notice devised by the District Court [in *Eisen*] will be sustained, although the defendants are attacking it. There are six million claimants of whom two million are readily identifiable from the records of the defendants. The District Court decided that of the two million, two thousand should be chosen by random and given direct notice, actual notice by mail, and that there should be in addition publication in some seven or eight or more newspapers. Going back to as far as *Hansberry and Lee* and even in state courts, the question of the adequacy of notice in class actions has to my mind always been recognized by the courts as depending not on the actuality of notice, but on the validity of the representation obtained for the plaintiffs as a result of that

42. The ACTL Amicus Brief opposes class actions because, *inter alia*, counsel for the classes may receive large fees for their efforts. It fails to disclose that in the four cases for which fees are cited (ACTL Amicus Brief, p. 21) the gross recovery for the classes was more than $87,000,000. This Court has encouraged the award of counsel fees in such public interest cases. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970). Since counsel fee awards in class actions are subject to court approval, there is ample protection against abuse.

In any event, the issue of fees is completely irrelevant to certification of a class. If the plaintiff class prevails at the trial and a fee is subsequently awarded, there will be ample opportunity to litigate its propriety. Raising a fee issue now is not only premature, it is disingenuously inflammatory.

notice. If I make myself clear, I understand the courts to have held, and I expect the Supreme Court to hold, that if as a result of this method of notice in *Eisen* does, as I think it is likely to do, convince the Court that sufficient people received actual notice having the same interests or representing all the interests involved on the plaintiffs' side, and there is adequate representation by those who are actually before the court as plaintiffs, whether original plaintiffs or ones who subsequently joined, then those unnoticed, whether deliberately or by accident (and I should point out that no matter what mailing you make some people are not going to receive actual notice) is sufficient to bind those people, because they have been represented adequately in court and that is the basis for sustaining any class action.

• • •

As to who should pay for the notice, I hesitate to make any prediction. There are cases and there have been hints in a number of opinions by important courts, that there are situations in which the defendant should undertake some of the activity, at least with respect to notice which would cost money. For example, an electric utility which sends bills monthly to its customers. Obviously, it doesn't cost much, if anything, to stuff an extra piece of paper in the monthly bill. On the other hand, whereas here you are going to make a defendant put out, I think it is around $90,000 [sic], to send out the type of notice ordered, I don't see how the Supreme Court can approve that *unless* it says that the order must have been preceded by a mini-hearing at which the judge makes a finding of a reasonable probability of success on the part of the plaintiff. This, of course, is the standard test in a prelim-

inary injunction application, a temporary retraining order, and was the procedure used by the District Court in the *Eisen* case."

Proceedings of the Pennsylvania Bar Institute, Harrisburg, Pa., December 7, 1973: Remarks of Philip H. Strubing, Esq. (Transcribed from recordings of the proceedings, made available by the Institute to plaintiff's counsel).

The defendants are plainly apprehensive that in restricting the usefulness of class actions the Court of Appeals has too apparently jeopardized civil rights and environmental cases; so they hasten to suggest that the decision does not apply to such cases (*e.g.*, Resp. Br., pp. 21, 100). The American College of Trial Lawyers reflects the same view (ACTL Br., p. 12). The distinctions which they seek to make are patently without substance.[43]

Indeed, the zeal of the ACTL has led it into an extraordinary error. "Contrary to the assertions made by several of the *amici* who support petitioner," the ACTL Brief declares, "the decision of the Court of Appeals would not affect in any significant way the efforts of those who seek by litigation to vindicate the civil rights of the underprivileged. After all, this Court's landmark civil rights decisions were *not* rendered in class actions and did not depend in any way upon Rule 23." (Amicus Br., pp. 21-22). This statement is contradicted by the leading case cited to support it, *Brown v. Board of Education*, 347 U. S. 483 (1954) (*Id.*, p. 22), which was undeniably a class action. See 347 U. S. at 495. This, the most significant and far reaching civil rights action of the century, was litigated

43. Professor Philip Schrag of Columbia Law School has observed that in *Eisen* "if the ruling of the lower court is affirmed, it's a disaster for consumer protection and environmental protection groups." Christian Science Monitor, February 6, 1974, p. 1.

as a class action, and was not derailed by unreasonable and unnecessary individual notice requirements, because what counted was the adequacy of representation.[44]

The rights of the class in *Eisen* are important federal rights which merit vindication under the antitrust laws and the Exchange Act, and should not be sacrificed to the cynical view that the remedy is inversely proportional to the number of persons injured. Such a holding scarcely engenders the respect for law which is already held in low enough public esteem. In a variety of situations courts require recourse to the class action device in order to fashion effective relief. See *e.g., Bermudez v. United States Department of Agriculture, supra,* 17 F. R. Serv. 2d at 1156-1157.

The defendants' attempts to mask the devastating impact of the *Eisen* decision are also negated by the great concern shown by those Amici who have openly disclosed where their own interets lie and perceive a severe threat if the *Eisen* decision is permitted to stand—twenty states (whose attorneys general represent the full range of the political spectrum), the American Civil Liberties Union, the Public Citizen and Consumers Union of the United States, and the NAACP Legal Defense Fund.

The fall-out of *Eisen* is already taking its toll, as district courts sense that the law has changed toward limiting class actions once again to mere joinder devices.[45] Thus in *Ralston v. Volkswagenwerk A. G.,* 1973-2 CCH Trade cases ¶ 74,772 (W. D. Mo. 1973), the Court said "*Eisen III* is a substantial and justifiable departure from the views expressed in an opinion filed in an earlier appeal in that case,

44. The school desegregation cases are among many civil rights cases resolved by the Court as class actions. See *e.g., Griggs v. Duke Power Company,* 401 U. S. 424 (1971) and *Turner v. Fouche,* 396 U. S. 346 (1970).

45. But see, *American Pipe & Construction Co. v. Utah, supra.*

and I therefore place little reliance on the substantial body of case law that has developed from the opinion in Eisen II . . . ." That "substantial body of case law" is now threatened, including cases in every Court of Appeals where the issue has been presented, holding that Rule 23 should be liberally construed and wide discretion allowed to the district courts "on the firing line".

The defendants' basic thrust is to scoff at the notion that violators of the anti-trust laws should be made to repay the "fruits of their violations". They describe that notion as an "extraordinary position" (Resp. Br., p. 21), and characterize it as "plaintiff['s] . . . philosophy" (Resp. Br., p. 21). But nowhere in their 109 page brief do the defendants try to distinguish *Hanover Shoe Co. v. United Shoe Machinery,* 392 U. S. 481, 494 (1968), in which the stated purpose of the holding was to insure that violators of the antitrust laws would not "retain the fruits of their illegality because no one was available who would bring suit against them."

The rule of *Hanover Shoe* that wrongdoers ought not be allowed to profit from their wrong is not a rule invented by plaintiff in this case; nor is it "an alleged principle of equity" (Resp. Br., p. 45). Rather it is a principle that has been repeatedly announced by this Court. *Accord: Bigelow v. RKO Pictures,* 327 U. S. 251, 265 (1946), a case also ignored by the defendants.

Rather than deciding questions which may never arise and are clearly not ripe for review, such as fluid recovery, and insisting that the plaintiff must pay for millions of individual notices, which he cannot possibly afford and which due process does not require, the Court of Appeals should have borne in mind that ". . . class suits were known before the adoption of our judicial system, and were in use in English Chancery. . . ." *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356, 366 (1921). Instead of strait-

jacketing the District Court, it would better have taken to heart the wisdom of Lord Cottenham in *Taylor v. Salmon*, 4 Myl. & Gr. 134, 141-2 (1838) that:

> "[It is] the duty of this Court to adapt its practice . . . to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not . . . decline to administer justice, and to enforce rights for which there is no other remedy." (Quoted in Chafee, Some Problems of Equity, Ch. VI, p. 212).

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